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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM 1953

No. 491

MYRA PAGE WIREN,
Petitioner,

v.

PARAMOUNT PICTURES, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

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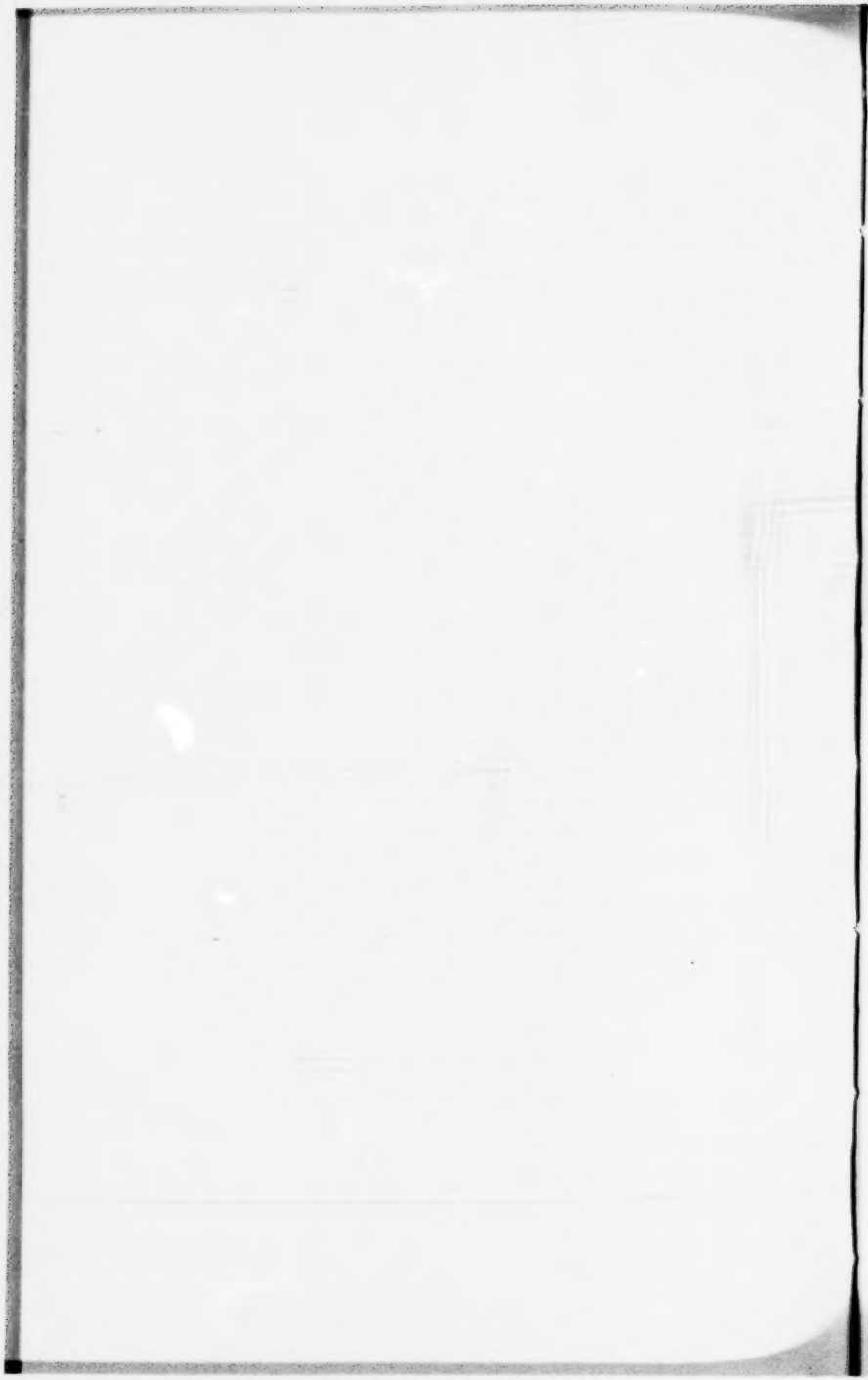

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IN THE

Supreme Court of the United States

OCTOBER TERM 1953

MYRA PAGE WIREN, *Petitioner,* v. PARAMOUNT PICTURES, INC., *Respondent.*	No.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

Myra Page Wiren prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, affirming an order of the District Court dismissing the complaint of the petitioner filed in the United States District Court for the District of Columbia.

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia is reported 206 F. 2nd. 465; it is included in the record herein at R. 51-56.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1953 (R. 57), and the order of the Court of

Appeals denying the petition for rehearing was entered on September 11, 1953 (R. 72). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an independent action in a Federal Court to obtain relief from a prior Federal Court judgment procured through the admitted bribery of the presiding judge should be barred by a local statute of limitations without reference to the Federal equitable doctrine of laches?

2. Whether Rule 15(c) of the Federal Rules of Civil Procedure permits an amendment to a complaint charging the defendants with fraud to be related back to the date of the original complaint where the amendment sets forth conduct of the defendants designed to suppress and continue the frauds alleged to have been committed in the original complaint?

3. Whether an independent action to obtain relief from a judgment procured through fraud upon the court is barred under the doctrine of res judicata by virtue of the denial by the court in which the fraud was practiced of a motion to set aside its earlier decision when it is alleged that the fraud was continued through the proceedings on the motion to set aside?

STATUTE INVOLVED

Title 12, District of Columbia Code, Sect. 201;

> ". . . no action the limitation of which is not otherwise specially prescribed in this section shall be

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brought after three years from the time when the right to maintain such action shall have accrued . . ."

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 15(c) of the Federal Rules of Civil Procedure:

"Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Rule 60(b) of the Federal Rules of Civil Procedure:

"Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered

or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

STATEMENT

On September 28, 1948, petitioner filed her complaint in this proceeding in the United States District Court for the District of Columbia. Since this proceeding has been disposed of in the courts below on the basis of a motion to dismiss addressed to the pleadings, petitioner's statement will attempt to summarize the important allegations contained in her complaint, which for purposes of the motion were to be treated as fact.

Petitioner's complaint was a lengthy one and set forth and described in some detail the circumstances and the fraudulent conduct of the defendants which gave rise to her cause of action. Petitioner alleged that she had authored and copyrighted a dramatic work entitled "Most" from which the play "Death Takes a Holiday" had been plagiarized (R. 2-4). The defendants were charged with having knowingly pirated petitioner's work through the production, exhibition and broadcast of that play (R. 4-7).

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Petitioner then related her earlier efforts to secure redress for those wrongs. She had originally brought an action for plagiarism in the United States District Court for the Southern District of New York which was dismissed in 1933 on a motion for judgment on the pleadings. (*Wiren* v. *Shubert Theatre Corp. et al,* 5 F. Supp. 358; R. 7-11). An appeal to the United States Court of Appeals for the Second Circuit was taken, and that court, with Judge Manton presiding, affirmed the decision of the District Court in May, 1934. (*Wiren* v. *Shubert Theatre Corp.,* 70 F. 2d 1023, certiorari denied 293 U. S. 591; R. 11, 12).

The complaint then alleged that several years after that decision of the Court of Appeals the bribery and corruption of Judge Manton was discovered (R. 13). Following the conviction of Judge Manton, petitioner in April, 1942, made a motion to the Court of Appeals to set aside its earlier affirmance of the decision of the District Court. The motion was heard on affidavits without witnesses or proof and was denied in May, 1942 (R. 13). A petition for certiorari from the decision denying petitioner's motion was denied (R. 13, 14). A second motion was presented to the Court of Appeals in 1945, which motion was denied without opinion in November, 1945 (R. 14).

In her original complaint in this action, which was filed within three years of the filing of the second motion in the Court of Appeals, petitioner set forth at length the fact that Albert D. Lasker, who was responsible for the bribery of Judge Manton and who the Court of Appeals said in its decision on the first motion was only remotely interested in the defendant Paramount, was in fact deeply involved financially in the affairs of Paramount and that he stood to lose large sums of money if the petitioner were success-

ful in her original action for plagiarism (R. 12, 13). Petitioner recited in the complaint facts showing that this evidence did not become available to her until after the finding of the Court of Appeals to the contrary, that she had at all times acted with due diligence, and that immediately after the decision of the Court of Appeals in 1945, she began preparations to start a proceeding based upon the continuous acts of fraud of the defendants (R. 15).

The defendant Paramount filed its answer (R. 21) and thereafter a motion to dismiss (R. 29) urging that the present action was barred by res judicata and by the statute of limitations.

In March, 1950, during a preliminary hearing on defendant's motion to dismiss, the District Court permitted petitioner to amend her complaint by adding paragraph 50 thereto. That paragraph specifically charged that Paramount had actively continued its fraud upon the petitioner and the courts by presenting false affidavits to the Court of Appeals in 1942 and 1945 in opposition to the motions made by the petitioner to the Court of Appeals (the false affidavits dealt with the connection between Lasker and Paramount and between Lasker and Judge Manton) and that as a result of such fraud and false affidavits, had procured decisions favorable to it (R. 17).

In July, 1950, the District Court after hearing argument on defendant's motion to dismiss ordered, *sua sponte* and without request therefor by either side, the case to be transferred to the United States District Court for the Southern District of New York. Petitioner petitioned the United States Court of Appeals for the District of Columbia for a writ of mandamus and that court decided that the order of transfer was erroneous and that the case should proceed in the District of Columbia (*Wiren* v. *Laws*, 90 App. D. C.

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105, 194 F. 2d 873; R. 37-40). Upon remand the District Court after hearing further argument, dismissed the complaint stating in a memorandum opinion that the action was barred by res judicata by virtue of the earlier denials in 1942 and 1945 of the motions for relief by the United States Court of Appeals for the Second Circuit (R. 41-46).

An appeal to the United States Court of Appeals for the District of Columbia was taken and that court affirmed the decision of the District Court, although for entirely different reasons (R. 51-56). It stated that the original complaint set forth a cause of action based upon the bribery of Judge Manton, which was discovered more than three years prior to the time this suit was instituted, and that the 1950 amendment to the complaint, which specifically charged the defendant with fraud during the subsequent proceedings in 1942 and 1945 before the Court of Appeals, could not be related back to the original complaint since it set forth a new and distinct cause of action. Since the amendment was filed more than three years after the last frauds therein alleged, the court held that this action was barred by the District of Columbia statute of limitations (District of Columbia Code, Title 12, Section 201).

REASONS FOR GRANTING THE WRIT

1. In deciding that the District of Columbia statute of limitations was applicable to a proceeding of this type, the Court of Appeals decided an important question of Federal law which has not been, but which should be, settled by this Court and acted in a way which is in conflict with related decisions of this Court.

The Court of Appeals held that petitioner's cause of action was barred by the three year District of Columbia

Statute of Limitations. The propriety of the use of a local statute of limitations to bar a proceeding of this nature raises a question of wide application not heretofore decided by this Court and seemingly in conflict with related decisions of this Court.

Rule 60(b) of the Federal Rules of Civil Procedure prescribes the methods and the general bases for obtaining relief from judgments of a Federal Court. Where a claim of fraud upon the court is made, two modes of relief are there provided; the first being a motion to the court in which the fraud was perpetrated; the second being an independent action for relief. If an independent action is brought, the action need not be begun in the court which rendered the contested judgment (Notes of Advisory Committee on Amendments to Rules, 28 U. S. C. A. following Rule 60). One of the issues raised by the decision in this case is whether in determining the timeliness of the action, the Federal Court in which the independent action is begun should apply the general Federal doctrine of laches or the local statute of limitations.

A somewhat similar problem was presented to this court in *Holmberg* v. *Armbrecht*, 327 U. S. 392. In that case a suit of an equitable nature was brought in a Federal Court to enforce liability on the holder of bank stock under the Federal Farm Loan Act. This Court held that the state statute of limitations, which would have barred the proceeding, was inapplicable and that the Federal doctrine of laches should be used to determine whether the suit was timely. The Court stated at p. 394:

> "The considerations that urge adjudication by the same law in all courts within a state when enforcing a right created by that state are hardly relevant for determining the rules which bar enforcement of an

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> equitable right created not by a state legislature but by Congress. . . . When Congress leaves to the Federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally created equitable rights."

The case of *Guarantee Trust Co.* v. *York,* 326 U. S. 99, was expressly held inapplicable since in that case although the action was begun in a Federal court, the sole basis of Federal jurisdiction was diversity of citizenship and purely state created rights were involved.

It is submitted that the reasoning of the Court in *Holmberg* v. *Armbrecht, supra,* is fully applicable here. If a defrauded party seeks relief in a Federal court from a judgment of a Federal court pursuant to Rule 60(b), his right to obtain such relief should not be determined solely by the local law of the forum in which he may bring his action for relief. The relief to which a party is entitled under Rule 60(b) should be the same in every Federal court. The only way to achieve such uniformity throughout the Federal courts is to apply a general doctrine of laches rather than the particular period of limitations in effect in the forum in which the suit is commenced.

A motion to a Federal court to relieve a party from the burdens of a prior judgment rendered by that court which was procured through a fraud upon that court may be made at any time. *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 322 U. S. 238. There is patently no logical basis for permitting the same court in which the fraud was perpetrated to act without the restriction of a local statute of limitations and at the same time to prevent other Federal courts from giving similar relief as contemplated in Rule 60(b) because of a local statute of limitations. Rule 60(b)

gives to litigants in a Federal court certain important rights which should not be and cannot be thwarted by local rules.

In *Hazel-Atlas Glass Co.* v. *Hartford Empire Co., supra,* this Court permitted a judgment to be upset nine years after it had been rendered and despite the fact that the petitioner did not exercise the highest degree of diligence because the fraud complained of—a fraud upon the court—was such a serious and permeating wrong in that it involved not merely private rights but the integrity of the judicial system itself. The fraud alleged in the instant case is far more more vicious that that which occurred in the *Hazel-Atlas* case. If the lack of diligence of the complainant in that case was found not to be sufficient to preclude punishment for the fraud fifteen years after it had been first practiced and nine years after it had been relied upon by the court, certainly a local three year statute of limitations should not preclude similar relief here.

Counsel has been able to find no decisions of this Court or the Courts of Appeals resolving the question of what law is to be applied in independent actions which are commenced to secure the relief prescribed in Rule 60(b). Cf. *Griffith* v. *Bank of New York,* 147 F. 2d. 899 (2 Cir. 1945), certiorari denied, 325 U. S. 874 (state procedure for setting aside a judgment not controlling where action brought in Federal court). It is urged that certiorari be granted in this case in order that this question may be resolved.

2. The decision of the Court of Appeals with respect to the application of Rule 15(c) of the Federal Rules of Civil Procedure is in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

Even if the local three year statute of limitations is believed applicable, it is submitted that the Court of Appeals

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misinterpreted Rule 15(c) of the Federal Rules of Civil Procedure, and rendered a decision in conflict with the decisions of other United States Courts of Appeals.

The Court of Appeals held that the amendment to the complaint set forth a new claim and therefore was not entitled to relation back pursuant to Rule 15(c). The court admitted that the conduct described in the amendment was motivated by, grew out of, and was intended to conceal the fraud alleged in the original complaint (R. 56). But relying upon the language of the Court of Appeals for the Tenth Circuit in *L. E. Whitham Construction Co.* v. *Remer,* 115 F. 2d. 371 (10 Cir. 1939), that "The Rule is not applicable where the amendment introduces a different and additional claim or cause of action" (R. 54), the court refused to relate the amendment back to the date of the original pleading.

It is submitted that Rule 15(c) was designed to avoid the necessity of making the technical determination of whether a new claim or cause of action is presented by an amendment. The application of Rule 15(c) depends instead upon the answer to the practical question of whether the defendant knew at the beginning of the suit the facts which the plaintiff seeks to put into the complaint by way of amendment. See Chafee, *Broadening the Second Stage of Federal Interpleader,* 56 Harv. L. Rev. 929, 964. The facts of this case meet all of the criteria set forth by other Courts of Appeals in determining whether or not to relate amendments back. The more important of these tests laid down by the other Courts of Appeals are: (a) whether the defendant had reasonable notice that the matters set forth in the amendment were in issue; (b) whether the evidence to be introduced with respect to the amended complaint is sub-

stantially the same as that for the unamended complaint; (c) whether but a single recovery is sought; (d) whether the amendment seeks merely to amplify or clarify the complaint; (e) whether the amendment is designed merely to meet affirmative defenses to the complaint; and (f) whether the defendant is prejudiced by relating the amendment back. See *Maty* v. *Grasselli Co.*, 303 U. S. 197; *Tiller* v. *Atlantic Coast Line R. R.*, 323 U. S. 574; *Michelson* v. *Penney*, 135 F. 2d. 409 (2 Cir. 1943); *Blair* v. *Durham*, 134 F. 2d. 727 (6 Cir. 1943); *Hirshhorn* v. *Mine Safety Appliance Co.*, 101 F. Supp. 549 (W. D. Pa. 1951), affirmed 193 F. 2d. 489.

Indeed the decision of this court appears to be in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *Partin* v. *Wade*, 172 F. 2d. 50 (8 Cir. 1949). Here an amendment was related back to the date of the original pleading because the amendment met an affirmative defense by showing facts which constituted an answer to the claim made in the affirmative defense that the statute of limitations was a bar to the action. In this case what the petitioner sought to do by her amendment was to show that the defendant continued and suppressed the fraud alleged in the original complaint, thereby extending the period of limitations.

The case relied upon by the Court of Appeals (*L. E. Whitham Construction Co.* v. *Remer, supra*) has been criticized by the leading text writers as being contrary to the purpose of Federal Rule 15(c). See 1 Barron & Holtzoff, *Federal Practice and Procedure* 912; 3 *Moore's Federal Practice* 854. It is submitted that the references in that case and this to the conceptualistic issue of whether or not a new cause of action has been set forth in the amendment

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is incorrect and in conflict with the decisions of this and other courts.

It is submitted, morever, that a careful reading of the instant complaint discloses that the amendment in fact merely made more specific matters alleged in the original complaint. Petitioner charged the defendants with continuous acts of fraud in the original complaint (R. 15), and set forth affirmatively the facts about which the Court of Appeals for the Second Circuit had been misled (R. 12, 13). In the amendment, petitioner merely recited that the continuous acts of fraud consisted of submitting false affidavits to the Court of Appeals on those matters (R. 17).

Clearly, the interpretation of Rule 15(c) as established by this Court and other Courts of Appeals required the application of the doctrine of relation back under such circumstances.

3. The Action Is Not Barred By Res Judicata.

In view of the Court of Appeals' holding on the statute of limitations, it was unnecessary for that court to consider the correctness of the District Court's determination that the instant proceeding was barred by the doctrine of *res judicata*. This question is vital to the interpretation of Rule 60(b) and has not yet been passed upon by this Court or by the Courts of Appeals.

As already indicated, Rule 60(b) provides that relief in certain situations may be obtained by either a motion to the court in which the decision was made, or by an independent action. One of the issues involved in this case is whether resort to a motion precludes a later resort to an independent action.

It is submitted that if the court to which the motion was addressed did not proceed to adjudicate the validity of the charge made on the motion by hearing witnesses and proof, the denial of the motion should not preclude resort to a later independent proceeding for relief. In *Hazel-Atlas Glass Co.* v. *Hartford Empire Co., supra,* this Court noted that:

> "We do not hold and would not hold that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on *ex parte* affidavits without examination and cross-examination of witnesses." *Id.* at 248.

Not every disposition of a motion precludes a party from obtaining relief in equity. See *Freeman on Judgments,* Section 1198 (Fifth Ed. 1925). This is especially true of motions of the type here involved where the relief requested lies within the discretion of the court. See *Griffith* v. *Bank of New York, supra.*

Furthermore, the petitioner has charged the defendant with fraud in the course of the motions, and this alone would be sufficient to avoid the doctrine of *res judicata. United States* v. *Atherton,* 102 U. S. 372.

The California courts in construing section 473 of the California Code of Civil Procedure, from which Rule 60(b) was copied, have held that relief by motion and independent action are distinct and cumulative, and resort to one does not preclude resort to the other. *Estudillo* v. *Security Loan & Trust Co.,* 149 Cal. 556, 87 Pac. 19; *Baker* v. *Baker,* 217 Cal. 216, 18 P. 2d 61; *Gump* v. *Gump,* 42 Cal. App. 2d 64, 108 P. 2d 21.

It is submitted that the District Court erred in this respect and that Rule 60(b) should be applied consistently with the theory of this Court in *Hazel-Atlas Glass Co.* v.

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Hartford Empire Co., supra, and with the California decisions interpreting the rule from which it was copied.

4. Actions Based Upon Fraud Upon a Court Are Unique And Are Entitled To The Utmost Liberality.

For purposes of this proceeding, it is admitted that the defendant bribed a United States Judge and thereby secured a decision favorable to it in a very important case. At stake is the very integrity of the administration of justice.

It is submitted that the language of this Court in the case of *Holmberg* v. *Armbrecht*, 327 U. S. 392, is most pertinent:

> "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair.
>
> "Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that 'laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties'. . . . And so, a suit in equity may lie though a comparable cause of action at law would be barred. If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.
>
> "Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant

from setting up such a fraudulent defense, as it interposes against other forms of fraud."

Relief from fraud is one of the primary bases for the invocation of equity. As was stated in *Skelly Oil Co.* v. *Universal Oil Products Co.*, 338 Ill. App. 79, 86 N. E. 2d 875, "Courts should not be helpless to find a remedy for a fraud of the instant type. If the statute fails to provide a remedy, the court can, as it has in many instances under the common law and equitable principles".

The petitioner has acted with far more diligence than did the petitioner in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.* If the court was willing in that case to overlook the petitioner's lack of diligence in order to erase a stain upon the court's integrity, certainly under principles of equity a similar result should have been reached in this proceeding.

It is submitted that there is no instance where it would be more appropriate for a court to exercise every effort to overcome a mechanical construction of a statute of limitations than in a situation such as this, where the defendant has corrupted a Federal Judge and has thereafter resorted to active affirmative concealment of that act by the use of false and fraudulent affidavits. Time should not be permitted to aid such a wrongdoer. *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. 2d 514 (3 Cir. 1948).

This case has had a long and tortured history. The questions presented by it are not simple. But as the case is now presented to this Court, the fraud of the defendant is admitted. Surely good conscience cannot allow such a fraud to stand. *Marshall* v. *Holmes*, 141 U. S. 589; *Publicker* v. *Shallcross*, 106 F. 2d 949 (3 Cir. 1939), cert. denied, 308 U. S. 624.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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December 8, 1953.

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IN THE

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October Term, 1953

No. 491

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v.

PARAMOUNT PICTURES, INC., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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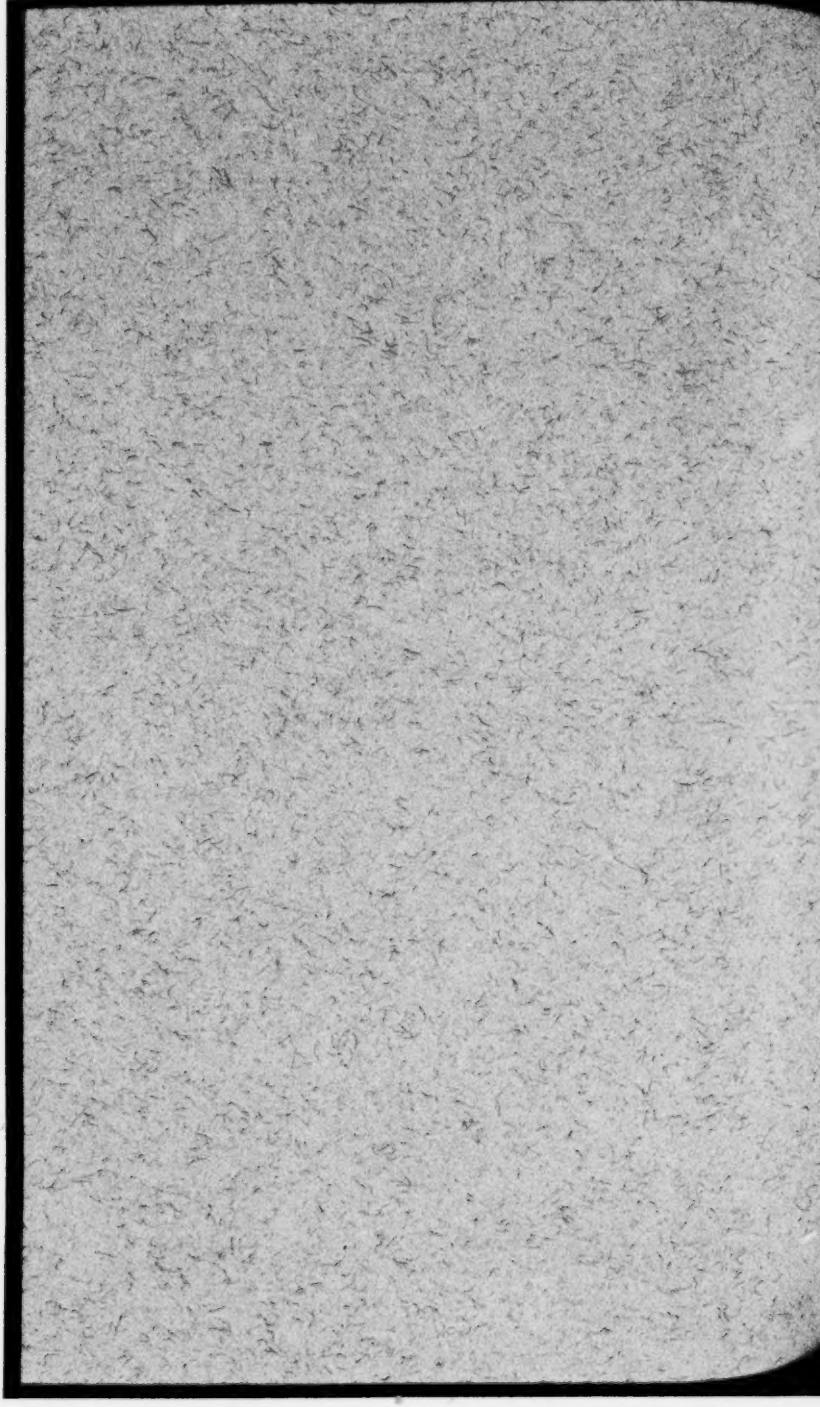

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In The

Supreme Court of the United States

October Term, 1953

No. 491

Myra Page Wiren, *Petitioner*,

v.

Paramount Pictures, Inc., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Respondent concedes this Court has jurisdiction under 28 *U.S.C.* Sec. 1254(1) and that the petition is timely.

QUESTIONS PRESENTED

1. Whether the present suit is barred by the three-year Statute of Limitations in force in the District of Columbia.
2. Whether it is barred by the doctrine of *res judicata*.

STATUTE INVOLVED

District of Columbia Code (1951) 12:201:

> "No action shall be brought for the recovery * * * of damages for any injury to real or personal property * * * after three years from the time when the right to maintain any such action shall have accrued * * *; and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued * * *"

COUNTER-STATEMENT OF THE CASE

This case has been in the courts since April 3, 1931 when plaintiff filed a suit for copyright infringement of her play "Most" by the production of "Death Takes a Holiday" (App. 4A, 7A). The District Court for the Southern District of New York held there was no infringement and dismissed the suit (*Wiren* v. *Shubert Corp. et al*, 5 F. Supp. 358). The dismissal was affirmed *per curiam* (Manton, Swan and Chase, JJ) 70 F.(2) 1023, and certiorari was denied, 293 U.S. 591, rehearing denied, 293 U.S. 631.

Petitioner's Charges of Fraud:

On June 20, 1939 Circuit Judge Manton was convicted of corruption. In the meantime, in 1937 (Op. below App. 53; App. 13A) plaintiff discovered, or fancied she had discovered, a fantastic bribe of Judge Manton; namely, that Albert D. Lasker, a stockholder in Paramount, in May 1932 had bribed Manton through Lord & Thomas, Lasker's advertising firm, with a bribe of $250,000:

> "to procure a decision in favor of defendant Paramount Corporation in any appeal which was certain to be made from any ruling of the District Court on plaintiffs' bill of complaint." (App. 13A)

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The important point about the alleged bribe is the date, May 1932 (App. 13A). Appellant's infringement suit had not yet been tried, in fact it was not tried until August 24, 1933, over a year later, when the District Court dismissed it on the ground there was no infringement. (See *Wiren* v. *Shubert Co.*, 5 F. Supp. 358). Hence appellant's theory is that Lasker was so terrified of the infringement suit that he paid Manton $250,000 to "fix" the *appeal* in a suit which was not even *tried* in the District Court until 1 year and 3 months later. To appreciate the utter absurdity of such a charge the Court need only read the opinion in the infringement suit, *Wiren* v. *Shubert Co.*, 5 F. Supp. 358, where appellant's play "Most" is laid side by side with "Death Takes a Holiday." The latter no more resembles "Most" than it does Hamlet, or Faust. The complete dissimilarity between "Most" and "Death Takes a Holiday" is so apparent as to suggest the frivolousness of any appeal at all, which is indicated by the *per curiam* affirmance at 70 F. (2) 1023.

Having created the imaginary bribe, appellant's next task was to get it before the Court. This she accomplished by waiting almost five years until April 28, 1942, when she filed a motion for rehearing in the Circuit Court of Appeals (App. 13A). It was denied May 13, 1942 by Judges Swan, Clark and Frank in a memorandum opinion stating:

> "Motion denied. The delay in making this motion is not adequately explained. But assuming that this defect could be cured by a further affidavit, the alleged disqualification of Judge Manton to hear this appeal is not established. On motions such as this we have several times ruled that the disqualification must be directly connected with the very case on appeal. Mr. Lasker, to whom Judge Manton is said to have been indebted, was not a director of Paramount when this appeal was heard and he owned but 33 shares out of 3,000,000 shares of Paramount's stock. Moreover, Paramount was in the hands of

reorganization trustees at the time of the appeal. Mr. Lasker's interest in Paramount was too remote to implicate Judge Manton. None of the other charges of disqualification has been substantiated. We are satisfied that the appeal was heard by a qualified court and was correctly decided." (Tr. 609; cf. App. 43A)

Appellant then proceeded to wait three (3) more years until June 12, 1945, when she filed a new petition for rehearing in the same C.C.A. (App. 14A). The petition was based on allegedly newly discovered evidence to the effect that the C.C.A. was wrong in holding, above, that Lasker's interest in Paramount was too remote. Instead she said it was controlling and also alleged she had further proof of the Manton bribe (App. 14A). The Court (Swan, Chase and Clark, JJ) on November 14, 1945, denied the new motion in the following words:

> "Ordered that said motion be and it hereby is denied. Regardless of any question of laches, the 'newly discovered evidence' does not warrant modification of our former ruling." (App. 43A).

Appellant then waited almost three more years and filed the present suit September 28, 1948. (App. 52)

Chronology of the Case:

The chronology of the case for the last 20 years is as follows:

December 26, 1929.....	Death Takes a Holiday produced, Barrymore Theatre, New York City. (*Wiren* v. *Shubert,* 5 F. Supp. 358, 359)
April 3, 1931.....	Plaintiff files suit against Shubert, Paramount, et al., for infringement. U.S.D.Ct., S.Dist.N.Y. (App. 7A)
August 24, 1933.....	Goddard, J. dismisses suit; opinion holding no infringement 5 F. Supp. 358.

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May 21, 1934	Affirmance *per curiam* by C.C.A. 70 F. (2) 1023.
October 8, 1934	Certiorari denied, U.S. Supreme Court, 293 U.S. 591.
November 5, 1934	Rehearing denied, U.S. Supreme Court, 293 U.S. 631.
June 20, 1939	Circuit Court of Appeals Judge Manton convicted.
December 4, 1939	Manton's conviction affirmed 107 F. (2) 834.
April 28, 1942	Plaintiff moves for rehearing in C.C.A. on ground of alleged bribe to Manton. (App. 13A).
May 13, 1942	Above motion denied in memorandum opinion per Swan, Clark and Frank, JJ. (App. 13A, 43A).
October 12, 1942	Certiorari denied, U.S. Supreme Court, 317 U.S. 659.
June 12, 1945	New petition for rehearing filed in C.C.A. on ground of newly discovered evidence. (App. 14A).
November 14, 1945	Petition for rehearing denied per memorandum opinion of Swan, Chase and Clark. (App. 14A).
September 28, 1948	Present suit filed.
July 28, 1950	Paragraph 50 of Complaint amended. (App. 17A)

Holdings Below:

The District Court (Ch. J. Laws) held below that the denial of relief by the Circuit Court of Appeals for the Second Circuit on May 13, 1942 and June 12, 1945 (App. 13A-14A) constituted *res judicata* (App. 43A-46A). It also held the suit was, "as claimed by plaintiff," an action at law for damages based on fraud and was barred by the three-year Statute of Limitations in force in the District of Columbia (D.C. Code (1951) Title 12, Sec. 201; App. 46A). The Court below rested its opinion on the Statute of Limitations alone (App. 53-56). As to the original complaint based on happenings in 1932, discov-

ered in 1937, it held these events were long since barred (App. 53-54). As to the amendment to paragraph 50 of the complaint, filed July 28, 1950, alleging the original fraud was continued by Paramount in resisting plaintiff's motions of April 28, 1942 (App. 13A) and June 12, 1945 (App. 14A) in the C.C.A. by "wrongfully presenting incomplete evidence" (App. 17A), the Court below held this stated a new cause of action and did not under Rule 15(c) FRCP relate back to the present complaint filed September 28, 1948 (App. 54-56). The Court below said:

> ". . . And even though it be assumed that such subsequent conduct was motivated by, and in that sense grew out of, the fraud alleged in the original pleading, nevertheless the claim of fraud asserted in the amendment was independent and distinct, consisting of presenting to and withholding evidence from the court in 1942 and 1945. This was a new claim, not the original claim or cause of action based upon the bribe. (App. 56).

As to this part of the alleged fraud, the Trial Court (C[illegible] J. Laws) held that this was obviously intrinsic fraud for which no relief could be given in present suit. (App. 44A).

ARGUMENT

Preliminary:

Before discussing the question raised by the petition for certiorari, namely the Statute of Limitations, res judicata, construction of Rule 15 (c) of the FRCP, etc., there is a preliminary matter which, we think, is dispositive of the whole matter on the merits.

The petitioner's motion for a rehearing filed in the Court of Appeals for the Second Circuit on April 28, 1942, (App. 13A) sought a rehearing of the original appeal from Judge Goddard's judgment dismissing the complaint, which adjudicated that there was no plagiarism.

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The ground upon which Petitioner sought a rehearing in the Court of Appeals for the Second Circuit was that Judge Manton was disqualified from sitting on that Court which affirmed Judge Goddard's judgment dismissing the complaint. The Court of Appeals, which had that motion before it did not include Judge Manton. In its memorandum decision denying petitioner's application for rehearing (Swan, Clark & Frank J. J.) it held not only that Judge Manton was not disqualified from sitting on the appeal, but it went further and held that the appeal from Judge Goddard's judgment was *"correctly decided"* (App. 43A) In other words, the petitioner had no cause of action for plagiarism in the first place. This Court denied certiorari (317 U. S. 659)

In view of the foregoing, there is really nothing further for this Court to consider on the present petition. Petitioner has had her day in the District Court of the Southern District of New York and has had a proper review of the judgment rendered in that Court by a Court of Appeals competent and qualified to hear and decide the appeal.

A. The Present Suit Is One at Law, for Damages for Fraud:

If the present suit is one at law for damages, as both courts below held (App. 46A, 52-53), then admittedly we never reach petitioner's claim that there is a so-called Federal rule of laches which overrides the three-year Statute of Limitations of the District of Columbia (D.C. Code (1951) Title 12, Sec. 201). Plaintiff's own statements put the matter beyond dispute.

On page 2 of her Brief below petitioner stated: "This is an action for damages * * *." In paragraph A of her Supplemental affidavit filed August 3, 1950, she stated: "This is a new and independent action for damages to the plaintiff caused by fraud and corruption * * *."

(Tr. 497)[1] In her Petition for Writ of Mandamus filed below, she stated the action was one "for damages for fraud" (Pet. C.A. (D.C.) No. 283 Misc. p. 1). She continued:

> "The Complaint filed stated a new and original independent action for damages. * * * All other matters alleged in the Complaint in this action, including the copyright infringement, are purely secondary and incidental matters." (Pet. Below, No. 283 Misc. 1951, p. 2).

This statement is reflected in appellant's Brief below wherein she stated, p. 4:

> "the plaintiff commenced this action seeking *inter alia* damages * * * and an injunction restraining the defendant from using the judgment of the New York Court as a defense to this action."

The injunction is therefore asked to prevent the New York judgment being used as a defense in the present suit, (See appellant's brief below, Point II, p. 6; also p. 17) and hence is not an application for general injunctive relief.[2] Appellant in her Brief below, p. 16, repudiates the statement of the Court below that the case has a "dual aspect", in part a suit for injunctive relief and in part to obtain a money judgment. She continues:

> "But the basis of this action is not the infringement of the plaintiff's copyright. It is rather the fraud of the defendants. This is not the action for plagiarism which was brought in New York. This is a new and independent action for fraud * * *." (Appellant's Brief below, p. 16).

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[1] The record reference is to the pages of the unprinted record lodged in the Court of Appeals.

[2] The Court below took this view, stating:
"It is true that the complaint in this jurisdiction requests some relief equitable in nature but this must be construed as dependent upon the maintenance of the action for fraud." (App. 53, footnote 1).

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Paramount is therefore entitled to take the present suit as one for damages for fraud. It was so regarded by the Trial Court which, after eliminating any right to injunctive relief came, finally, to consider "the claim of damages resulting from fraud." (App. 43A, 46A).

The Trial Court also stated:

> "* * * since plaintiff's suit for fraud appears, as claimed by plaintiff, to be an action for damages based on fraud, it is barred by the Statute of Limitations." (App. 46A).

This was approved by the Court below (App. 53, 56).

B. An Action for Fraud Is Barred by the Three-Year Statute of Limitations:

Both Courts below held the action was for fraud and barred by the three-year Statute of Limitations of the District of Columbia (D.C. Code (1951) Title 12, Sec. 201). (App. 46A, 56). That statute applies to actions for fraud (*Johnson* v. *Taylor*, 73 F. Supp. 537; *District-Florida Corp.* v. *Penny*, 62 App. D.C. 268; 66 F. (2) 794). Even if the suit is indiscriminately at law and in equity, the three-year statute applies (*Anglo-Colombian Co.* v. *Stapleton*, 57 App. D.C. 209; 19 F. (2) 683; *Hurdle* v. *American Security & Trust Co.*, 59 App. D.C. 58; 32 F. (2) 954, 956).

As petitioner discovered the original fraud in 1937, as held by the Court below (App. 53), it follows that the present complaint, filed September 28, 1948, was long since barred at that time.

C. The Present Suit Is Likewise Barred by the Doctrine of Res Judicata:

This was the principal basis of the Trial Court's decision. (App. 43A-46A).

The essence of the original complaint is evidently the so-called bribery of Judge Manton. When petitioner discovered it in 1937 (Op. below, App. 53; App. 13A) or thought she did, she had the option of either (a) attempting to set aside the District Court judgment for fraud in the appeal; or (b) filing a suit for damages for fraud. She chose the first course and lost and is now barred, on elementary principles of *res judicata*, from attempting the second. The doctrine of *res judicata* cannot be circumvented by a mere change in the form of the suit;[1] once the grievance is heard by a Court it disappears as a cause of action. (*Diamond* v. *Berman*, 95 F. Supp. 73, 74, distinguishing *Griffith* v. *Bank of New York*, 147 F. (2) 899; 30 *Am. Jur.*, p. 920). Hence the decisions of the C.C.A. (2nd Circuit) are binding as *res judicata*.

The two decisions by the C.C.A. are based partly on laches and partly on the unsatisfactory nature of appellant's so-called "evidence." In the first decision dated May 13, 1942, the Court said "Motion denied. The delay in making this motion is not adequately explained." (App. 43A). In the second, November 14, 1945, the same Court said "Regardless of any question of laches, the 'newly discovered evidence' does not warrant modification of our former ruling." (App. 43A).

Petitioner states in her Brief below, p. 14:

> "It is submitted that if the court to which the motion was addressed did not proceed to adjudicate the validity of the charge made on the motion by hearing witnesses and proof, the denial of the motion should not preclude resort to a later independent proceeding for relief."

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[1] The present is a mere switch from equity to law, a device repudiated in *Toucey* v. *N.Y. Life Ins. Co.*, 102 F. (2) 16, 20; cf. same case 314 U.S. 118, 127 and after remand 112 F. (2) 927, 928.

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This is simply the layman's notion that a court cannot decide a case without hearing witnesses. If followed it would read laches out of the law as a defense. The point is that the C.C.A. held it could never get to the merits *because of laches*, i.e., that a defense of law *prevented* the court hearing the case. Or put another way, the Court held the motion had no merit because of the delay. Appellant's argument is simply a contention that denying relief on the ground of laches is not a decision on the merits. The cases here cited hold the contrary and make laches as good a ground for *res judicata* as any other defense of law.[1]

The doctrine of *res judicata* applies to decisions of an appellate court (*In re Cherokee Co.*, 94 F. (2) 546; 50 *C.J.S. Judgments*, Sec. 607. In *Margardt* v. *Colonial-American Bank*, 78 App. D.C. 348, 140 F. (2) 701, the Court below held that a decision based on laches could be the basis of *res judicata*. (Cf. *Cain* v. *Union Central Life Ins. Co.*, 123 Ky. 59; 93 S.W. 622; *Liken* v. *Shaffer*, 64 F. Supp. 432, 445).

Even if erroneous, the two C.C.A. decisions are *res judicata* as to the present suit. (*U. S.* v. *Moser*, 266 U.S. 236, 242).

The decision of the C.C.A. (2nd Circuit) dated May 13, 1942 not only held the motion was barred by laches but went on to say it had no merit otherwise; that Lasker instead of having millions at stake owned only 33 shares of Paramount's stock out of 3,000,000 and was not even a director at the time. Hence the Court said Lasker's interest in Paramount was too remote to implicate Judge Manton (Plaintiff's Motion to Vacate filed in C.C.A. June 12, 1945, p. 2, Tr. 609). Petitioner now says the C.C.A. was wrong, that Lasker owned more

[1] After holding laches the C.C.A. each time went on to say the motion had no merit otherwise (App. 43A).

stock than Paramount said he did and that she only discovered this after the C.C.A.'s 1942 decision which she says was induced by Paramount's "wrongfully presenting incomplete evidence to that Court." (App. 17A). But this, too, was passed on by the C.C.A. in its May 14, 1945 decision which held the "newly discovered" evidence did not warrant relief. (App. 43A). The vice of petitioner's argument for a present rehearing of this issue is, from a legal viewpoint, that *res judicata* applies not merely to what was *in fact* presented to the C.C.A. in 1942 and 1945 but what *could* have been presented. (*Nalle* v. *Oyster*, 36 App. D.C. 36, 41, Affd. 230 U.S. 165; *Great Atlantic & Pacific Tea Co.* v. *West*, 56 App. D.C. 103, 104; *Beloit* v. *Morgan*, 7 Wall. 619; *Cromwell* v. *Sac County*, 94 U.S. 351). Petitioner's alleged exception as to fraud (*Commissioner* v. *Sunnen*, 333 U.S. 591, 598) is no aid to petitioner because the issue of fraud itself has already been passed upon by the C.C.A., i.e., in its decision of November 14, 1945 the Court said "Regardless of any question of laches, the 'newly discovered evidence' does not warrant modification of our former ruling" (Op. 43A). In other words, the C.C.A. considered the alleged fraud, both old and newly discovered, and held that on the showing made the charge had no merit. No more is before this Court than was before the Circuit Court of Appeals for the Second Circuit in 1945; the Complaint will be searched in vain for any proffer of evidence discovered since 1945. (See Compl. App. 14A-17A). All petitioner has done is to cast her grievance in a new form, "a new and independent action for damages", as she calls it, going on and on in her interminable struggle with prior Court rulings on the precise matter she asserts anew. No clearer need for the doctrine of *res judicata* can be found.

Added to everything else is the sound holding of the Trial Court that even if the affidavits as to Lasker's interest filed in 1942 and 1945 were erroneous and frau-

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dulent, still the so-called fraud was intrinsic, as to which the law affords no relief whatever in a new suit or otherwise. (Opinion of Trial Court, App. 44A; see also *U. S.* v *Throckmorton,* 98 U.S. 61; *Pico* v. *Cohn,* 25 P. 970; *Restatement on Judgments,* Sec. 126(2)(b)).

D. There Is No Conflict of Decision:

The Court below drew a distinction between the alleged bribery of Judge Manton in May 1932 and the alleged false affidavits filed in the C.C.A. in 1942 and 1945 (App. 54-56). It held the latter was a new and distinct claim and hence did not relate back under Rule 15(c) so as to avoid the Statute of Limitations. It seems clear the Court was right; the first claim was complete in 1932 and the second did not arise until ten years or more later. The alleged conflict of decision arises out of petitioner's claim that *L. E. Whitham Construction Co.* v. *Reiner,* 105 F. (2) 371 (C.A. 10th), cited with six other cases by the Court below, is in conflict with *Partin* v. *Wade,* 172 F. (2) 50 (C.A. 8th). There is no conflict; the latter case turned on a provision of Arkansas law that in the event of a nonsuit a new action could be started within a year. It is a mere play on words to say the new suit on the old claim "related back." The Court of Appeals in *Partin* squarely held it did not present a new or different cause of action. This however is the precise question here and hence *Partin* is not in point. In addition both the *Whitham* & *Partin* cases decided what was or was not a separate and distinct cause of action under state law which governed and hence neither is in any real sense a construction of FRCP 15(c).

Even if there were a conflict it would relate to the peculiar circumstances of the present case and would resemble *U. S.* v. *Coplon,* 342 U.S. 920 and *Coplon* v. *U. S.,* 342 U.S. 926, wherein certiorari was denied. Also there are so many other grounds on which the decision below

can be supported that this Court could never reach the alleged conflict (Cf. *NLRB* v. *Sanson Hosiery Mills,* 195 F. (2) 350, cert. denied 344 U.S. 863; *The Arlington* v. *Meyer,* certiorari denied 339 U.S. 965. The case, therefore, has no certiorari appeal under any circumstances.

CONCLUSION

The late Senator Borah once referred to a certain bill as having been "washed up on the shores of debate like some vast prehistoric animal washed up on the shores of the Potomac; too dead to be sent to the zoo, too alive to be sent to the Smithsonian." The present case is similarly situated and we hope this Court will, at last, lay its bones at rest.

Respectfully submitted,

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